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In the Supreme Court of the United States

OCTOBER TERM, 1974

COLORADO RIVER WATER CONSERVATION DISTRICT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

MARY AKIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. No. 74-940, 1a-15a; Pet. App. A No. 74-949, 19-33)

is reported at 504 F. 2d 115. The oral opinion of the district court (Pet. App. No. 74-940, 17a-21a; Pet. App. B No. 74-949, 34-41) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 1974. A timely petition for rehearing was denied on November 12, 1974. The petitions for writs of certiorari were filed on January 30, 1975, and February 1, 1975, respectively. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, which consents to the joinder of the United States in general water adjudication actions, divests the federal district courts of jurisdiction in such actions when brought by the United States.

2. Whether the court of appeals was correct in ordering the district court to hear the case, rather than abstain in favor of an after-filed state proceeding.

STATUTE INVOLVED

43 U.S.C. 666, the McCarran Amendment, provides in pertinent part:

> (a) Joinder of United States as defendant; costs.
>
> Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: *Provided*, That no judgment for costs shall be entered against the United States in any such suit.

STATEMENT

On November 14, 1972, the United States instituted this civil action in the United States District Court for the District of Colorado to determine its water rights (for various federal reserves) and the water rights of the Ute Mountain Ute and Southern Ute Indian Tribes regarding the San Juan River and its tributaries in the State of Colorado.[1] Jurisdiction was invoked under 28 U.S.C. 1345, which provides

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[1] Pet. App. 3a, 30a. Unless noted to the contrary, "Pet." and "Pet. App." references are to the petition and appendix in No. 74-940.

that "the district courts shall have original jurisdiction of all civil actions, suits or proceedings, commenced by the United States * * *."

On January 3, 1973, apparently in response to this suit, several water districts of the State of Colorado filed suit in state court for adjudication of essentially the same water rights already at issue in the federal court suit (No. 74-940 Pet. 7, Pet. App. 3a; No. 74-949 Pet. 5).[2] The plaintiffs in the state court action and other water districts were allowed to intervene in the federal suit, after which they and various water users named in the federal suit moved to dismiss the proceedings in federal court.[3] In re-

[2] Petitioners, in No. 74-949, assert that "[a]n action was pending * * * to determine the relative rights of all parties to the San Juan River system (which is included in Water Division 7 under the state scheme) at the time the United States chose to ignore that appropriate forum and attempted to bifurcate the water right determination procedure by filing its action in the United States District Court" (Pet. No. 74-949, 11). This statement is contradicted by the same petitioners at Pet. 5, where they state "[o]n January 3, 1973, an action was commenced in state court (Water Division 7) which embraced the identical water right claims which the United States was advancing in federal court." It is also contradicted by the petition in No. 74-940. See pp. 6-7. Apparently, while there were periodical adjudications of particular claims to water in state court, no general stream adjudication had been undertaken as to the San Juan River System nor was the United States served notice of any action prior to January 3, 1973.

[3] The petitioners in No. 74-940 are those intervenors. The petition in No. 74-949 describes its petitioners as "approximately twelve hundred Colorado citizens, a number of public entities, and the State of Colorado" (Pet. 1). This description is somewhat confusing because none of the attorneys listed on the petition are shown as representing the individual water users and the State has not heretofore claimed to represent them as *parens patriae* nor does it so claim in the petition. There is also some overlapping. For instance, the Mancos Water Conservancy District seems to be a petitioner in both petitions.

sponse to the motion, the district court expressed doubt about its jurisdiction to hear the case, but without resolving the jurisdictional question, invoked doctrines of abstention and comity, and dismissed the United States' complaint (Pet. App. 17a-21a).

On the United States' appeal, the Court of Appeals for the Tenth Circuit reversed the district court's dismissal and remanded the case for further proceedings consistent with its opinion (Pet. App. 1a). The court of appeals held that the McCarran Amendment, 66 Stat. 560, 43 U.S.C. 666, does not divest the United States district courts of jurisdiction over water right adjudications to which the United States is a party, but merely permits the United States to be made a party to such adjudications whether brought in federal or state court. The court of appeals also held that in the circumstances of this case, where federal rights are at issue and there are no unresolved questions of state law, it was inappropriate for the federal court to decline to exercise its jurisdiction.

ARGUMENT

This case concerns nothing more or less than a choice of forum question. Will the extent and the

priority of the water rights of the Southern Ute and Ute Mountain Ute Indian Tribes, as well as other federally reserved rights, be litigated in state or federal court? The court of appeals properly held that the federal district court, where the action was filed, should not abstain in favor of a later-filed conflicting action filed in state court. The decision is correct and does not warrant further review.

1. Petitioners in No. 74-940 apparently assert here (Pet. 16-20), as they did in the court of appeals, that the McCarran Amendment and this Court's decisions in *United States* v. *District Court in and for the County of Eagle*, 401 U.S. 520, and *United States* v. *District Court in and for Water Division No. 5*, 401 U.S. 527, divest the United States district courts of jurisdiction to entertain water rights adjudications brought by the United States.[4] The court of appeals correctly rejected this contention (Pet. App. 4a-9a), holding that the McCarran Amendment is simply a waiver of sovereign immunity which permits the United States to be joined in general water adjudication proceedings but does not divest federal district courts of jurisdiction to entertain such actions and does not require the United States, as a plaintiff, to bring its actions in state courts.

The McCarran Amendment could hardly be read otherwise. The Amendment provides that "Consent

[4] Petitioners in No. 74-949 accept the jurisdiction of the district court and base their argument on discretionary abstention and comity. See No. 74-949 Pet. 2, Question Presented. See also note 5, *infra*.

is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source * * *" (43 U.S.C. 666a). There is nothing in the statute to indicate that the United States district courts are divested of the jurisdiction granted by 28 U.S.C. 1345 to adjudicate "civil actions * * * commenced by the United States."

The decision of the court of appeals in this regard is consistent with this Court's decision in *United States* v. *District Court in and for the County of Eagle, supra.* There the Court ruled on the extent of the consent to suit granted by the statute and quoted the following statement by Senator McCarran as an apt description of the Amendment (401 U.S. at 525):

> *S. 18 is not intended * * * to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream.* This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. [Emphasis added.]

Similarly, nothing contained in this Court's opinion in *United States* v. *District Court in and for Water Division No. 5, supra*, even suggests that the McCarran Amendment barred federal courts from entertaining suits brought by the United States to

adjudicate water rights in rivers, streams and the like.[5]

2. The court of appeals also correctly held that the district court erred by invoking the abstention doctrine to avoid deciding the issues before it (see Pet. App. 9a-15a). One of the primary functions of the federal courts is to decide cases involving federal rights.[6] The government brought this suit because important federal and Indian water rights needed to be determined. Water rights adjudications are a normal part of the function of federal courts in the

[5] Accord: *United States* v. *Cappaert*, 508 F. 2d 313 (C.A. 9), pending on petition for a writ of certiorari, No. 74-1107.

Petitioners in No. 74-949 argue (Pet. 11-13) that comity required the federal court to defer to state adjudication.

Since the United States sued in the United States District Court before the action began in the Colorado state courts (see note 2, *supra*), comity would logically require the state courts to refrain from interfering with the United States District Court's adjudication of the water rights claimed by the United States in this action. *Covell* v. *Heyman*, 111 U.S. 176, 182-185; *Penn General Casualty Co.* v. *Pennsylvania ex rel. Schnader*, 294 U.S. 189, 195-196; *Kline* v. *Burke Construction Co.*, 260 U.S. 226, 230-231; *Palmer* v. *Texas*, 212 U.S. 118, 125; *Byers* v. *McAuley*, 149 U.S. 608, 614. The issues of federal-state relationship raised by the doctrine of comity are more fully discussed in part 2, *infra*, concerning abstention.

[6] As the court of appeals, quoting from Mr. Justice Story, stated (Pet. App. 5a): "It would be a perfect novelty in the history of national jurisprudence, as well as of public law, that a sovereign had no authority to sue in his own courts." Reserved rights to sufficient water to satisfy the needs of federal installations or Indian reservations are federal or federally protected rights. See *Arizona* v. *California*, 373 U.S. 546, 595-601.

western states.[7] A federal court is thus the proper forum in this kind of case where, as here, significant

[7] Federal courts, indeed, have remained a usual forum for western water rights adjudications where major federal rights are at issue. For example, the cases listed below are now pending in federal courts. We note, also, that a number of these cases were commenced by the State of New Mexico, one of the amici.

State of New Mexico v. *Aamodt, et al.*, Civil No. 6639 U.S. D.C., New Mexico (Water rights in Nambe-Pojoaque River).

State of New Mexico v. *Aragon, et al.*, Civil No. 7941 U.S. D.C., New Mexico (Water rights in Chama River).

State of New Mexico v. *Abbott, et al.*, Civil No. 7488 U.S. D.C., New Mexico (Water rights in Santa Cruz River).

State of New Mexico v. *Abeyta, et al.*, Civil No. 7896 U.S. D.C., New Mexico (Water rights in Pueblo de Taos River).

State of New Mexico v. *Arrellano, et al.*, Civil No. 7939 U.S. D.C., New Mexico (Water rights in Hondo River).

State of New Mevico v. *Acequia Del Alto de la Acequia Del Llano Community Ditch Assn., et al.*, Civil No. 8650 U.S.D.C., New Mexico (Water rights in Truchas River).

State of New Mexico v. *Molybdenum Corp.*, Civil No. 9780 U.S.D.C., New Mexico (Water rights in Red River).

United States v. *Bel Bay Community & Water Assn.*, Civil No. 303-71 U.S.D.C., W.D. Washington (Water rights on Lummi Indian Reservation).

United States v. *Walton*, Civil No. 3831 U.S.D.C., E.D. Washington (Water rights in unnamed tributary to Omac Lake on Colville Indian Reservation).

United States v. *Anderson, et al.*, Civil No. 3643 U.S.D.C., E.D. Washington (Water rights in Chamokane Cheek).

United States v. *J. Ed Smith*, Civil No. 71-17 Globe U.S. D.C., Arizona (suit to enjoin pumping from underflow of Gila River).

United States v. *Cappaert, supra* (Devils Hole National Monument).

federal and Indian reserved rights are involved, since the case will turn on issues of federal, not state, law. *United States* v. *District Court in and for the County of Eagle, supra*, 401 U.S. at 525-526. See also *Arizona* v. *California, supra*, 373 U.S. at 595-601; *Winters* v. *United States*, 207 U.S. 564. Indeed, the reserved rights doctrine is essentially alien to Colorado state water law. *United States* v. *District Court in and for the County of Eagle, supra*, 401 U.S. at 523.

Moreover, the district court was not presented with any issues of unclear state law, which might support the application of the doctrine of judicial abstention. See *Harman* v. *Forssenius*, 380 U.S. 528, 534; *Baggett* v. *Bullitt*, 377 U.S. 360, 375-377. In an adjudication of this sort the established priorities between state users are often a matter of record and easily established and the real question is the relation of federal rights to those state created rights (see p. 13, *infra*).

Particularly where Indian rights are at issue, a federal court is an appropriate forum. In 1966 Congress enacted 28 U.S.C. 1362 to provide district court jurisdiction for all civil actions brought by Indian tribes involving federal questions, without regard to

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[7] *United States* v. *Truckee Carson Irrigation District, et al.*, Civil No. R2987JBA U.S.D.C., Nevada (Water rights in Truckee River—Pyramid Lake).

United States v. *Tongue River Water Users Association, et al.*, Civil No. 75-20 U.S.D.C., Montana (Water rights in Tongue River and Rosebud Creek).

the amount in controversy. The House report recommending the bill stated that it is appropriate for litigation involving tribal lands held in trust to be brought in federal courts. (H. Rep. No. 2040, 89th Cong., 2d Sess. 2) The Senate report states (S. Rep. No. 1507, 89th Cong., 2d Sess. 2):

> There is great hesitancy on the part of tribes to use state courts. This reluctance is founded partially on traditional fear that tribes have had of the states in which their reservations are situated. Additionally, federal courts have more expertise in deciding questions involving treaties with the federal government, as well as interpreting the relevant body of federal law that has developed over the years * * *.

Similarly in 1953 in Public Law 280, 67 Stat. 588 (now codified at 18 U.S.C. 1162, 28 U.S.C. 1360 and, as amended in 1968, 25 U.S.C. 1321 and 1322), when Congress conferred civil jurisdiction on the courts of some states to adjudicate controversies arising in Indian country, it specifically withheld from state court jurisdiction the power to adjudicate "the ownership or right to possession of [real or personal property, *including water rights*, belonging to any Indian or Indian tribe]." 28 U.S.C. 1360(b) and 25 U.S.C. 1322(b) (emphasis added).

This Court has often recognized that federal courts are a desirable forum for litigating Indian rights. For instance, 25 U.S.C. 357 provides that Indian allotted land "may be condemned for any public purpose under the laws of the State * * * where lo-

cated in the same manner as land owned in fee may be condemned * * *." In *Minnesota* v. *United States*, 305 U.S. 382, the Court held that such suits could only be brought in federal courts, stating:

> There are persuasive reasons why that statute should not be construed as authorizing suit in a state court. It relates to Indian lands under trust allotments—a subject within the exclusive control of the federal government. The judicial determination of controversies concerning such lands has been commonly committed exclusively to federal courts. [305 U.S. at 389.]

Similarly, in *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, the Court unanimously held that an Indian tribe's ejectment action, unlike similar actions brought by other claimants to land under federal law, was a federal question.

In sum, the district court erred when it abstained and the court of appeals correctly reversed the district court's judgment in this regard.[8]

3. Petitioners and *amici* seem to argue that the proper administration of justice requires that all stream adjudications be handled in state courts. But Congress has not endorsed that position and con-

[8] Petitioners in No. 74-940 argue (Pet. 16-20) that a state court has jurisdiction to determine Indian water rights although the McCarran Amendment refers only to federal water rights. This question need not be considered in this case under the decision of the court of appeals. Without Conceding that the McCarran Amendment consents to adjudication of Indian rights in state court, we here argue only that the federal court is clearly an appropriate forum for determination of such rights.

siderations of the convenience of the parties do not require it.

While the United States has served numerous defendants in this case, this provides both a notice and conclusiveness of result not available under the state procedures (compare No. 74-940 Pet. 12). Petitioners in No. 74-949 argue (Pet. 11-12) "If the federal action proceeds, over 1200 defendants must bear the oppressive burden of appearing in the geographically remote federal court to defend their water rights which were established pursuant to state law perhaps as long as a century ago." But it is not necessary that each served defendant individually prove his water right. Most of the non-federal and non-Indian water rights in this river system are subject to simple documentary proof.[9]

Moreover, to the extent that it is necessary to take testimony, this need not be done in Denver, where the district court sits (Compare No. 74-949 Pet. 11-12). An ordinary judicial technique in water adjudication is to appoint a special master to hold hearings where the defendants and the waters in question are located. See Rule 53, Fed. R. Civ. P. The decision of the court of appeals does not tie the hands of the district court in its management of this or future litigation.

[9] Indeed many are already established by the decree in *United States* v. *Morrison Consolidated Ditch Co., et al.*, Equity No. 7736, in the United States District Court for the District of Colorado, decided October 25, 1930.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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